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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Opinions of the Courts below are adequately presented in the Brief for the Petitioner.

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

STATUTES INVOLVED

The provisions of the Transportation Act of 1920, ch. 91, Title III, § 301, 41 Stat. 456; the Railway Labor Act of 1926; ch. 347, §§ 1, 2, First, Second, Third and § 5, First, 44 Stat. 577; the Railway Labor Act of 1934, ch. 691, §§ 2, First, Second, Third, Fourth, Ninth and 5, First, 48 Stat. 1185 (now 45 U. S. C. 152 First, Second, Third, Fourth, Ninth and 155 First), *amending* the Railway Labor Act of 1926, 44 Stat. 577; the National Labor Relations Act of 1935, ch. 372, § 1, 49 Stat. 449 (now 29 U. S. C. § 151); the Labor Management Relations Act of 1947, ch. 120, §§ 1, 2(2), 2(3), 8(a) (5), 8(b) (3), 8(d), 10(b), 10(c), 10(j), 10(k), 61 Stat. 136 (now 29 U. S. C., §§ 141, 152(2), 152(3), 158(a) (5), 158(b) (3), 158(d), 160(b), 160(e), 160(j), 160(k), *amending* Labor Management Relations Act of 1935, 49 Stat. 449 are set forth in Appendix A.

QUESTION PRESENTED

Whether, subsequent to notice, conference and negotiation as required by Section 6 of the Railway Labor Act and mediation as required by Section 5 of the Railway Labor Act with respect to a major dispute between a railroad and the representative of its employees over a proposed change in their collective agreement having been exhausted, a justiciable issue exists as to whether a party made every reasonable effort, as stated in Section 2, First of the Railway Labor Act, to make an agreement, so that the exercise of self-help by a party to the dispute is to be dependent upon the ultimate judicial determination of such issue.

STATEMENT

Respondent considers petitioner's statement with respect to the continuation of the dispute between petitioner and the union's several general chairmen representing em-

ployees in the several districts of the railroad since June 1965 should be supplemented.

Throughout this Brief we will sometimes refer to the Petitioner, Chicago & North Western Railway Company as the "Petitioner" or the "Railroad" or "CNW"; the Respondent, United Transportation Union, which succeeded the Brotherhood of Railroad Trainmen on January 1, 1969, as "Respondent" or as the "Union" or "UTU," the Railway Labor Act as "RLA," the National Mediation Board as the "NMB" and the National Labor Relations Board as "NLRB."

The Award of Arbitration Board No. 282 authorized changes in collective agreements with respect to the minimum number of persons to be employed in crews and yard service, in branch line service and in other road service where the former agreement, rule or practice required the employment of less or more than a conductor and two trainmen; thus the Award did not provide for changes in agreements, rules or practices theretofore existing which required a minimum crew of a conductor and two trainmen in main line road service (Plaintiff's Ex. 1, Tr. 27-28; 41 Labor Arbitration Reports 678-679; Ptr. Br. 7-8).

On January 29, 1965, an agreement which became known as the "Luna-Saunders' Agreement" was made between the BRT, represented by its President, Charles Luna, and 28 railroads, represented by Stuart Saunders, Chairman of the Board, and A. E. Perlman, President of the Pennsylvania Railroad Company and William White, Chairman of the Board of the Erie Lackawana Railroad Company. That agreement resolved the crew consist dispute between the Union and the 28 railroads providing for virtually all crews employed on those railroads to consist of not less than a conductor and two trainmen in road service and a conductor or foreman and two helpers in yard service (A. 18; Def. Exh. 5, tab. 1, Tr. 338).

A similar agreement, which became known as the "Luna-Touhy Agreement," was made March 22, 1965 between the Union, represented by its President, Charles Luna, and William J. Touhy, President of the Baltimore & Ohio Railroad Company, representing that railroad and three other railroads (Def. Exh. 5, tab. 2, Tr. 338).

In July 1965, the Union's General Chairmen served a Section 6 notice on some 80 railroads—other than those which were parties to the "Luna-Saunders" and "Luna-Touhy" agreements, but including the several districts of the CNW and the Chicago and Great Western R. Co., which was separate from the CNW until it merged into and became a district of the CNW on July 1, 1968 (A. 31), which had obtained agreements or arbitration awards pursuant to the Award of Arbitration Board No. 282, changing the collective agreements to authorize reductions in the minimum number of persons to be employed in crews; the notices proposed an agreement to become effective at the expiration of the Award of Arbitration Board No. 282 on January 25, 1966, to require the employment of a minimum of a conductor and two trainmen in road service crews and a conductor or foreman and two helpers in yard service crews, which was identical to the notice served by the unions on September 7, 1960 (A. 5-6, 10, 18, 73-74; Tr. 226-228, 231).

The railroads refused to enter into negotiations with the union with respect to those notices claiming they were without legal effect; thereupon the union invoked the services of the National Mediation Board with respect to the dispute and the Board assumed jurisdiction in the Fall of 1965 (A. 18, 74, 92-93, 97).

In December, 1965, each of the 80 railroads on which the unions' general chairmen had served Section 6 notices in July, 1965, including the several districts of the CNW, served an identical Section 6 notice on each of the general

chairmen (A. 94), which was the same as the notices that had been served on November 2, 1959; each notice proposed a collective agreement eliminating every agreement, rule or practice, however established requiring a minimum number of persons to be employed in train and yard service crews and for management to have the unrestricted right to determine the number and craft of persons to be employed in such crews (A. 53-54, 74-75, 79, 94). The notices also proposed that each railroad's notice be handled by the general chairman on whom it was served, concurrently with the notice theretofore served by the general chairman on the railroad and that, if no agreement should be reached by the union's general chairman and the railroad, that the general chairman join with other general chairmen on whom the same notice had been served by other railroads to create an employees' national conference committee to represent them and to negotiate the dispute to a conclusion with the railroads' Regional Conference Committee and the National Railway Labor Conference (A. 6, 10, 18-19, 32, 51-54, 74-75, 79, 105).

The unions' general chairmen met with officers of the railroads, including officers of the CNW, on January 18, 1966, and declined to agree to the railroads' proposed change in the collective agreements, to the railroads' proposals to handle the railroads' December notices concurrently with the general chairmen's July notices and to join other general chairmen on which other railroads had served the same December notice to establish a national employees conference committee to handle the dispute to a conclusion (A. 6-10, 18-20, 32-33, 106; Tr. 231, 403).

During January, 1966, the unions called up on the railroads to put into effect, upon the expiration of the Award of Arbitration Board No. 282, the crew consist agreements, rules and practices which had been in effect prior to the enactment of Public Law 88-108 (A. 19-20).

The railroads, including the several districts of the CNW and the Chicago Great Western invoked the services of the National Mediation Board with respect to the dispute arising from the notices served by them in December on the unions' general chairmen (A. 95). After the National Mediation Board assumed jurisdiction of the dispute, the National Railway Labor Conference sought to persuade the Board to concurrently mediate the disputes arising from the notices served in July, 1965, by the unions' general chairmen and on the general chairmen by the railroads in December, 1965 as a single national dispute rather than on a railroad by railroad or notice by notice basis, as the Board had commenced to do with respect to the notices served by the unions' general chairmen on the Atlantic Coast Line Railroad Company, the Boston & Maine Railroad Company and others (A. 21, 95-96, 99). The National Mediation Board, however, rejected the National Railway Labor Conference's suggestion, and continued to handle the disputes on a railroad by railroad, notice by notice basis (A. 173-174).

On January 19, 1966, at the direction of National Railway Labor Conference, the CNW and its several districts and the Chicago Great Western R. Co. and the other railroads upon which the unions' general chairmen had served the July, 1965 notices and which had served the December, 1965 notices upon those general chairmen (A. 174; Tr. 391, 393) filed *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691, 252 F. Supp. 207, 254 F. Supp. 306 (D. D. C. 1966), 385 F. 2d 581, 599 (D. C. Cir. 1967), *cert. den.*, 390 U. S. 923 (1968) and *Akron & Barberton Belt R. Co., et al. v. Order of Railway Conductors and Brakemen*, 253 F. Supp. 538 (D. D. C. 1966), 385 F. 2d 581, 598 (D. C. Cir. 1967), *cert. den.*, 390 U. S. 923 (1968).

After the final decision of the District Court in the *Akron & Barberton Belt* cases, on May 19, 1966, 254 F.

Supp. 306 (A. 107), the railroads, including the CNW, wrote the unions' general chairmen suggesting conferences in accordance with the court's decision (A. 21, 98-99, 107), and the National Mediation Board, on June 2, 1966, urged the parties to hold such conferences promptly (A. 21). In response to the urging of the National Mediation Board and the suggestion of the railroads, the general chairmen of the union did meet and confer with the management of the CNW in June and August of 1966, but the parties were unable to reconcile their differences with respect to procedural handling of the dispute (A. 33, 107).

On October 4, 1966, the National Mediation Board terminated its jurisdiction of the disputes between the Union and the Atlantic Coast Line R. Co., the Boston & Maine R. Co. and Des Moines Union R. Co. (A. 24-25) and on November 1, 1966, those railroads filed *Atlantic Coast Line R. Co., et al. v. Brotherhood of Railroad Trainmen,* 262 F. Supp. 177 (D. D. C. 1966), asserting in part that the BRT had not fulfilled the requirements of the Railway Labor Act, by refusing to handle the several disputes with the several railroads on a national basis (A. 25).

During the period from the initiation of the *Atlantic Coast Line* suit on November 1, 1966, until after both the *Akron & Barberton Belt* and the *Atlantic Coast Line* litigation had been completed—when this Court denied Petitions for Writ of Certiorari in both cases in January, 1968 (390 U. S. 923 and 389 U. S. 1047)—no further efforts were made by the CNW or the union's general chairmen representing its employees in any of its several districts with respect to settlement of the "crew consist" dispute, no meetings or conferences were held, and the National Mediation Board, which had assumed jurisdiction over the CNW crew consist dispute, held the matter in abeyance (A. 33-35, 107-108).

Subsequent to March 19, 1968 the parties conferred with respect to the dispute on five occasions in May, June, July and August, 1968 (A. 37, 110-114).

The parties further conferred with respect to the dispute on four occasions in April and May, 1969 (A. 26, 37, 40-42, 79-80, 102, 116-117, 120-123, 153-154, 166; Tr. 340-344, 371-372).

Commencing June 2, 1969 the National Mediation Board, through one of its veteran mediators, Arthur Glover, undertook actively to mediate the dispute between the parties and met with the parties on ten occasions until July 2, 1969, during which mediation sessions the parties exchanged and discussed written proposals by each of them (A. 44-47, 124-130, 197; Defendant's Ex. 6; Plaintiff's Ex. 16, 17, 18; Tr. 284-285, 338).

On July 2, 1969, Mediator Glover advised the parties that he was going to report to the National Mediation Board that mediation had failed (A. 47). On October 16, 1969, after rejection of the National Mediation Board's proffer of arbitration, the National Mediation Board terminated its jurisdiction of the dispute, advising the parties that:

> "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement."

(Defendant's Ex. 7, A. 198-199, Tr. 433).

After the NMB terminated its jurisdiction of the dispute, the parties engaged in further negotiations with respect to elimination and restoration of particular jobs, for seven full days, commencing on November 12, 1969, but no agreement was reached (A. 142-144).

On November 19, 1969, the CNW commenced this action for a declaratory judgment that the Union had not ex-

hausted the requirements of the Railway Labor Act and for an injunction against a strike by the Union on the ground that the union had not fulfilled the requirements of Section 2, First of the RLA requiring parties to make "every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" by:

> "First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless
>
> (a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;
>
> (b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;
>
> (c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and
>
> Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices" (Complaint, A. 5, 7).

SUMMARY OF THE ARGUMENT

Under the scheme provided by the Railway Labor Act for the voluntary resolution of major disputes with respect to making and changing collective agreements, for avoiding the exercise of self-help by parties to such dis-

putes by requiring the status quo to be maintained after notice, during conferences by the parties, during and after compulsory mediation or voluntary arbitration and, in some cases, during and after an investigation and Report to the President with respect to the dispute, the court below correctly held, in accordance with the decisions of this Court, that Section 2, First of the Act, providing that it shall be the duty of carriers and their employees to make every reasonable effort to make agreements, is not justiciable.

The court below also correctly ruled that the National Mediation Board, as the representative of the public in such disputes, rather than the courts, is the agency which the Act provides to assure compliance by the parties with Section 2, First in the exhaustion of the procedures of the Act, through the exercise of its power to prevent self-help and to require the status quo to be maintained for an almost interminable time and to recommend intervention by the President in the dispute by an investigation and Report by a Presidential Emergency Board.

The court below also correctly rejected petitioner's contention that Section 2, First of the Railway Labor Act is justiciable and correctly disagreed with the opinion of the Court of Appeals for the Fourth Circuit in Piedmont Airlines v. Air Line Pilots Ass'n., 416 F. 2d 633 (1969), which would, in effect, incorporate into the Railway Labor Act, through Section 2, First, provisions of the Labor Management Relations Act, for the National Labor Relations Board to obtain an injunction requiring a union to maintain the status quo and prohibiting a strike by the union pending a determination by the Board, upon evidence of the bargaining conduct of the parties, whether the union was guilty of the unfair labor practice of refusal to bargain in good faith and, depending upon such determination, to permit the union to strike or obtain an

injunction against a strike by the union until it should purge itself of the unfair labor practice. Such a procedure, if tacked onto the existing Railway Labor Act, would empower the courts to remand the parties to some point in the existing procedures of the Railway Labor Act and require re-negotiation or re-mediation until the court should be satisfied, upon evidence of the bargaining conduct of the parties, that there had been compliance with Section 2, First of the Railway Labor Act in the re-exhaustion of the procedures provided by the Act and whether the union then legally could strike.

Tacking such a judicial proceeding onto the exhaustion of the existing procedures of the Railway Labor Act and thus making the exercise of self-help dependent upon the result of such a judicial proceeding, was not contemplated by Congress in the enactment of the Railway Labor Act and, necessarily, would frustrate and probably supplant the existing scheme and provisions of the Act for the voluntary resolution of disputes.

Petitioner's argument that Section 2, First of the Railway Labor Act is justiciable is based upon a *misconception* of decisions of this Court and of statements in opinions of this Court and upon *obiter dictum* and *mistaken assumptions* by lower courts, which should be rejected, and the decision of the court below affirmed.

ARGUMENT

I

The Court Below Correctly Decided That Section 2, First of the Railway Labor Act Is Not Justiciable.

Circuit Judge Kerner speaking for the Court below (A. 222; 422 F. 2d at 985) construed Section 2, First of the Railway Labor Act, 45 U. S. C. 152, First, as not judicially enforceable because:

> "To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes."

That conclusion is fully supported by the prior decisions of this Court and particularly by *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, upon which the Court below relied (A. 222-223; 422 F. 2d at 985-986).

What is now Section 2, First of the Railway Labor Act has been so construed by this Court since it first appeared in railway labor legislation as Section 301 of Title III of the Transportation Act of 1920 which appears at page 1 of Appendix A to this Brief (Br. App. A, p. A-1).

Notwithstanding Section 301 of Title III of the Transportation Act of 1920 was couched in mandatory terms that "it shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier" and to consider and if possible decide all disputes in conference, this court said in *Pennsylvania Railroad System and Allied Lines Federa-*

tion No. 90, et al. v. Pennsylvania Railroad Co., 267 U. S. 203 at 210 and 215-216 (1925):

> "It is clear from this language that in the *Labor Board Case* this Court has decided that there is nothing compulsory in the provisions of the statute as against either the Company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law. The language of the Title is a legal definition of the jurisdiction and duty of the Railroad Labor Board in attempting to settle the controversies between the railroad employer and its employees, and where the Labor Board exceeds its jurisdiction and violates the provisions describing its functions, it may be subject to judicial restraint at the complaint of any properly interested party. *The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation or some other means of compulsion, . . . be given the force of a statutory obligation* of the parties to a dispute . . . But when the other sections of the Title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion" (emphasis supplied).

Section 2, First of the Railway Labor Act of 1926 has remained unchanged to date (Br. App. A, p. A-2) to provide:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning

rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

When Section 2, First of the Railway Labor Act was first considered by this Court in *Texas & New Orleans R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548 at 567 (1930), this Court treated it as not justiciable but enforced Section 2, Third of the Railway Labor Act of 1926 prohibiting railroad interference, influence or coercion in the designation of its employees of a representative.

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act providing that "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

"It is at once to be observed that *Congress was not content with the general declaration* [stated in Section 2, First of the Railway Labor Act of 1926] *of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements* concerning rates of pay, rules and working conditions, and to settle disputes with all expedition

in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect. *While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded.* The intent of Congress is clear with respect to the sort of conduct that is prohibited . . ." (emphasis supplied).

The quoted statement of this Court denies any validity to the argument by petitioner (Br. 34) that the *Texas & New Orleans* case is relevant here because it emphasizes the shift to a statute declaring judicially enforceable obligations; the only "shift" which occurred was in sections other than Section 2, First.

Moreover, the Senate Report with respect to the Bill which became the Railway Labor Act of 1926 makes it clear that the Act was not toward a compulsory system but instead was to establish a voluntary system for the resolution of disputes. The choice was deliberate, for as the Senate Report states:

"The question was consequently presented whether the substitute should consist of a compulsory system with adequate means provided for its enforcement, or whether it was in the public interest to create the machinery for amicable adjustment of labor disputes agreed upon by the parties and to the success of which both parties were committed.

Manifestly, it is unwise to commingle the two. One plan or the other should be adopted.

The committee is of opinion that it is in the public interest to permit a fair trial of the method of ami-

> cable adjustment agreed upon by the parties, rather than to attempt under existing conditions to use the entire power of the Government to deal with these labor disputes. If the plan proposed by the parties does not work, it will then be proper to consider what other methods are essential to protect the public interest in adequate and uninterrupted transportation." *S. Rep. No. 222 to accompany S. 2306, To Provide for the Prompt Disposition of Disputes Between Carriers and their Employees, Committee on Interstate Commerce, 69th Cong., 1st Sess., p. 3 (1926).*

This understanding of the effect of the Act was similarly articulated by Donald Richberg at Part 2, page 182 of the Hearings conducted by the Senate Committee on Interstate Commerce, 69th Congress, First Session, where he said: "I believe . . . that the most dangerous provision you can write into this law is any provision for compulsory investigation at any stage of the proceedings."

Petitioner's reliance (Br. 36-37) upon statements by Donald Richberg in the hearings conducted by the Congressional Committees which considered the Bills which became the Railway Labor Act of 1926 do not support petitioner's contention that Section 2, First, was intended to be justiciable. Instead, Mr. Richberg's conception of the extent to which Section 2, First, might be judicially enforceable was only to compel a railroad to deal with the representative freely selected by its employees; such concept was enacted as Section 2, Ninth, in the 1934 Amendments of the 1926 Railway Labor Act (Br. App. A. p. A-5). *See* Appendix B (p. A-16) to this Brief setting out Mr. Richberg's complete statements; the portion omitted by petitioner appears in italics.

Circuit Judge Kerner correctly rejected the railroad's great reliance upon this Court's decision in *Virginia Ry.*

Co. v. System Federation, No. 40, 300 U. S. 515 (A. 227, 228; 422 F. 2d at 988):

"The Railway places great reliance that §2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry. v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937). In *Virginia Ry.*, the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under §2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that §2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus in fact invoking the dictates of §2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that §2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of §2, Ninth, and simply provides that when the carrier and the employees' representatives

are negotiating they should be guided by the other provisions of the Railway Labor Act including §2, First."

Thus the Court below treated the failure of conferences not to raise a justiciable question of compliance with Section 2, First, the same as this Court did in the *Virginian* case. In *Virginian* this Court, 300 U. S. at 551-552, stated that if conferences failed, the dispute should be advanced to mediation by the NMB, which this Court said, in *Missouri-Kansas-Texas*, 320 U. S. at 337, "is the antithesis of justiciability." The Court of Appeals for the District of Columbia Circuit took the same view of the course of a major dispute in the event of a failure of negotiations. In *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 385 F. 2d 581 (1967), *cert. den.*, 390 U. S. 923 (1968) the Court of Appeals, in reversing a decision of the District Court that the notices involved in this case did not become effective until the expiration of the Award of Arbitration Board 282 after which full fledged conferences, which had not been held were required prior to mediation, said, 385 F. 2d at 597:

> "In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits or proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.
>
> "We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. *Once they have been frustrated, one side to*

> ***the dispute can move to the next*** **tier or procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices....'' (Emphasis supplied).**

Petitioner's treatment of the statement in the *Virginian* case as "dictum" (Br. pp. 57-58) is without substance. To so construe the *Missouri-Kansas-Texas* case and in the other two cases decided the same day, *General Committee of Adjustment v. Southern Pacific R. Co.*, and *Switchmen's Union of North America v. National Mediation Board, infra*, would be to completely ignore the comprehensive analysis of the legislative history of the 1926 Act and the 1934 Amendments to that Act, and the limitations stated by this Court in those cases with respect to what disputes are justiciable.

This Court considered Section 2, First of the Railway Labor Act and its prior decisions in the *Pennsylvania R. Co.* cases, *supra*, the *Texas & New Orleans* case and the *Virginian Railway* case in three cases which were decided November 22, 1943 and in which it delimited the original general jurisdiction of the Courts with respect to disputes arising under the Railway Labor Act; *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment v. Southern Pacific R. Co.*, 320 U. S. 338 and *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297.

In those three cases this Court held that only certain disputes were justiciable under the provisions of the Railway Labor Act, notwithstanding the apparent general original jurisdiction of federal district courts of *all* suits and proceedings arising under any law regulating commerce

(*Switchmen's Union* case, 320 U. S. at 300) and to render declaratory judgments in such actions (*Missouri-Kansas-Texas* case, 320 U. S. at 327-328; *Southern Pacific* case, 320 U. S. at 339, 343-344).

In the *Missouri-Kansas-Texas* case, this Court, after reviewing the history of the Railway Labor legislation and its prior decisions in the *Pennsylvania* cases, the *Texas & New Orleans* case and the *Virginian* case, said, 320 U. S. at 337:

> "... the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudictory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect those arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread.
>
> "We are here concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction. . . ."

Earlier in its opinion in the *Missouri-Kansas-Texas* case this Court said that it was Section 2, Ninth, of the Railway Labor Act, as amended in 1934, which was enforced in the *Virginian* case, rather than Section 2, First of the Railway Labor Act of 1926 (320 U. S. at 330-331). Also, earlier in its opinion in the *Missouri-Kansas-Texas* case, this Court again considered Section 2, First and its opinion in the *Virginian* case and expressly denied that Section 2, First, was justiciable, saying, 320 U. S. at 333-334:

> "The Engineers assert that the carriers had no right under the Act to negotiate with the Firemen on the subject of emergency engineers and that the Mediation Agreement of December 12, 1940, is therefore void. They rely on § 2, Fourth, of the Act and on § 2, First and Ninth. Section 2, Fourth states that 'Employees shall have the right to organize and bargain collectively through representatives of their own choosing'. But that great right, which Congress in 1926 at last supported with legal sanctions, is not challenged here. The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. Nor is it apparent how the majority rule provision of § 2, Fourth, is involved here. It states that 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged. *Nor does § 2, Second, make justiciable what otherwise is not.* It provides that 'All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition; in conference between represent-

atives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute'. *As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that 'the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act'. That command of § 2, Ninth, was enforced in the Virginian R. Co. case. But § 2, Second, like § 2, First,* [which provides that 'It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.''] *merely states the policy which those other provisions buttress with more particularized commands''* (emphasis supplied).

Petitioner plainly misrepresents the language of this Court in *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711 at 721, fn. 12 and 729, in fn. 26 (Br. 52-53, 58) as construing the *Virginian* case to hold Section 2, First to be justiciable and thus as a departure from its opinion two years previously in the *Missouri-Kansas-Texas* case, that Section 2, First is not justiciable. Neither can petitioner's argument, that in *Burley,* this Court construed the *Virginian* case differently than it had in the *Missouri-Kansas-Texas* case, and thus, that Section 2, First is justiciable under *Virginian* and *Burley,* rather than non-justiciable as under *Missouri-Kansas-Texas,* be reconciled with the statement in the text of the opinion in *Burley* (325 U. S. at 724-5) that the ". . . Compulsions [of the Railway Labor Act with respect to major disputes] go only to

insure that those procedures [of the Act for conference and negotiation, and mediation and, if mediation fails, then to acceptance or rejection of arbitration and, finally, to possible presidential intervention] are exhausted before resort can be had to self-help."

In *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963) this Court considered an earlier stage of this dispute. In that case the unions sought an injunction against self-help by the railroads on the ground the railroads' action would abolish crew-consist rules in violation of Section 2, First of the Railway Labor Act which requires railroads and their employees to make every reasonable effort to make and maintain agreements establishing rules. In that case petitioner here took a position, based on the *Missouri-Kansas-Texas* case, directly contrary to its position in this case. On page 22 of its Brief in the Court of Appeals in the *Baltimore & Ohio* case it stated:

> "The only provisions of the Railway Labor Act cited in the organizations' brief which have any materiality in this dispute are Sections 2, First and Seventh (45 USC 152, First and Seventh) and Section 6 (45 USC 156). Section 2, First provides that
>
> > "'*It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions*, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'
>
> "This section is a preliminary statement of the purpose and policy of the provisions of the Railway

Labor Act which follow. In *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323 (1943) the Supreme Court said:

> "'Nor does § 2, Second make justiciable what otherwise is not . . . But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands'."

This Court did not comment on the railroads' argument that Section 2, First was not justiciable when it decided *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al.*, 372 U. S. 284 (1963), but said, *per curiam*, at 290-291:

> "The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 725.
>
> '. . . [t]he parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.'
>
> • • • • • • • •
>
> ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board. . . ."

The Court adhered to that view in *Brotherhood of Railway & Steamship Clerks, etc., v. Florida East Coast Ry. Co.*, 384 U. S. 238 (1966), saying at 244:

> ". . . The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.
>
> "At that juncture self-help was also available to the carrier as we held in Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co., 372 U. S. 284, 291. . . . '• • • both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute • • •.' . . ."

and this Court has continued to adhere to the rule announced in the *Baltimore & Ohio* and *Florida East Coast* cases in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369 (1969), and in *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U. S. 142 (1969).

II

The Scheme and Provisions of the Railway Labor Act for the Resolution of Major Disputes Would Be Frustrated or Rendered Completely Ineffective by Tacking Onto Them Judicial Review of Whether a Party to Such a Dispute Has Complied With Section 2, First of the Act and, if Not, a Judicial Determination of What Such Party Must Do in Order to Comply.

The notion that Section 2, First of the Railway Labor Act confers jurisdiction upon courts to determine whether a party, in exhausting the requirements of the Act, made every reasonable effort, as contemplated by Section 2, First, to resolve the dispute, so far as we have found,

had its origin in *American Air Lines, Inc. v. Airline Pilots Ass'n.*, 169 F. Supp. 777 (D. C. S. D. N. Y. 1958). In that case, after the requirements of the Act, including an investigation and a report to the President by an Emergency Board, had been exhausted and the status quo periods had expired, the Airline sought an injunction against a strike by the Pilots, contending (169 F. Supp. at 780) as the CNW contends in this case, that the union had "refused to bargain in good faith" subsequent to the Report of the Emergency Board; the union contended, it had, in fact, exhausted the procedures of the Act in good faith and was legally entitled to strike.

The District Court stated that the case was not one in which the union had refused to bargain at all and there was no doubt that the union at least had gone through the procedural steps contemplated by the Act up to the time of the Report of the Emergency Board. However, the Court, upon the basis of the language of this Court in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, fn. 12, where this Court said that "good faith exhaustion of the possibility of agreement . . .", is required to comply with the provisions of the Railway Labor Act, took evidence to determine the union's good faith. Finding no helpful cases under the Railway Labor Act dealing with the standards to be applied in resolving the question of the union's good faith, which the Court said was one of subjective intent to be determined from the facts and circumstances, the District Court turned to Section 8 of the Labor Management Relations Act and cases arising thereunder for the standards for determining whether the requirements of good faith bargaining had been fulfilled by the union, 169 F. Supp. at 793-794. Applying the test to the evidence with respect to the conduct of the parties, the Court concluded the union had met the test of good faith negotiations and denied the Airlines' contention that the parties should be remanded to the

point at which the Presidential Emergency Board made its report and to engage in further negotiations and denied a preliminary injunction against a strike by the pilots.

It is apparent that the District Court in the *American Airlines* case misconstrued the language in the *Burley* case with respect to Section 2, First of the Railway Labor Act being justiciable as is shown under Point I, *supra.*

Piedmont Aviation, Inc. v. Airline Pilots Ass'n., 416 F. 2d 633 (4th Cir., 1969), is the most recent case to give expression to the view of the District Court in the *American Airlines* case, that the conduct of parties in exhausting the requirements of the Railway Labor Act is thereafter subject to judicial review and a judicial determination of whether such party has the right to exercise self-help.

The facts in *Piedmont,* as appear from the Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Columbia entered August 1, 1967 in *Ruby, etc., et al. v. Piedmont Aviation, Inc.*, Civil action No. 1820-69 (Br. App. C, p. A-25), and from *Piedmont Aviation, Inc. v. Airline Pilots Ass'n.*, 71 LRRM 3216 (D. C. M. D. N. Car. 1969), and from the opinion of the Court of Appeals for the 4th Circuit in *Piedmont Aviation, Inc. v. Airline Pilots Ass'n.*, 419 F. 2d 636, on appeal from a preliminary injunction granted by the District Court for the Middle District of North Carolina were as follows: In 1965 Piedmont ordered twelve Boeing 737 airplanes which it intended to commence operating July 1, 1968. In 1966, the Air Line Pilots Ass'n., hereinafter ALPA, adopted a mandatory policy that no less than three men would be employed in crews operating Boeing 737 aircraft regardless of whether the Federal Aviation Administration might certify the aircraft for operation by less than three. On August 28, 1967 ALPA proposed, under Section 6 of the Railway Labor Act, an agreement

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for a minimum crew of three persons to be employed on the airplanes. Piedmont counter-proposed for a crew of only two. The dispute was not resolved in extensive negotiations between the parties commencing in November 1967 and extending through May 8, 1969 during which time the National Mediation Board twice undertook to mediate the dispute and also a question arose with respect to the interpretation of an interim agreement which ALPA contended resolved the dispute.

On August 5, 1969 Piedmont instituted an action in the United States District Court for the Middle District of North Carolina for an injunction against a strike by ALPA apparently on the ground ALPA, in its negotiation and in mediation, had adamantly insisted upon a three man crew because its Constitution and By-laws prohibited it from agreeing to less than a crew of three and notwithstanding the Federal Aviation Administration had certified the 737 could safely be operated with a crew of two. On August 14, 1969 the District Court in North Carolina entered a preliminary injunction against a strike by ALPA.

Upon ALPA's appeal from the preliminary injunction which did not raise the issue of the justiciability of Section 2, First, the Court of Appeals directed the District Court to determine whether the dispute was a "major" or "minor" dispute (416 F. 2d at 639-640). If the District Court found the dispute to be "major" the Court of Appeals said with respect thereto (416 F. 2d 637):

> ". . . The district judge found that at numerous meetings the company sought to bargain with the union over the crew complement, but he described the union as having a 'mandatory policy' on this issue. He concluded that this raised questions of law and fact justifying a temporary injunction pending trial of the case. We construe these findings and con-

clusions as a ruling that the union failed to negotiate in good faith as required by the Railway Labor Act.

* * * * * * *

"On the record before us we cannot say that the district judge's findings are clearly erroneous or that he abused his discretion in granting a temporary injunction. Piedmont introduced evidence that the union would not bargain for a crew of less than three men because its bylaw forbade bargaining over that subject. The bylaw does not in itself prove lack of good faith bargaining. Chicago, R. I. & P. Ry. v. Switchmen's Union, 292 F. 2d 61, 67 (2d Cir. 1961), cert. denied, 370 U. S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962). But use of the bylaw as a reason for refusal to bargain on the issue of crew complement, in the face of the Federal Aviation Administration's certification of the B-737 for two-man crews, is not consistent with the Railway Labor Act's provisions requiring the parties 'to exert every reasonable effort to make and maintain agreements concerning * * * working conditions, and to settle all disputes * * * in order to avoid any interruption of commerce.' 45 U. S. C., § 152, First. See Elgin, J. & E. Ry. v. Burley, 325 U. S. 711, 721 n. 12; American Airlines, Inc. v. Air Line Pilots Ass'n. Int'l., 169 F. Supp. 777, 793 (S. D. N. Y. 1958).

"*At the trial on the merits for a permanent injunction the details of each bargaining session will be more fully developed by examination and cross-examination of the participants.* From this the district judge will be in a position to make more definite findings of the historical facts. Consequently, what we have said is not intended to anticipate the outcome of the hearing for a permanent injunction. If that trial fails to establish lack of good faith bargaining, the injunction against the strike should be dissolved. Implicit in

the Railway Labor Act is the right of employees to strike over a major dispute after the proceedings required by the Act have been exhausted. Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., 394 U. S. 369, 378, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969). *And even if the trial discloses a lack of good faith bargaining, the injunction must not be a permanent bar to the strike. Provision should be made for its dissolution, whether or not agreement is reached, when the union complies with the Act. The union—no less than the company—has the right to resort to self-help when proceedings under the Act have been exhausted.*" (Emphasis supplied.)

The consequence and effect of the order of the Court of Appeals in the *Piedmont* case, if the District Court should find the dispute was a major dispute with respect to which the requirements of the Railway Labor Act admittedly had been exhausted, would be for the District Court then to determine, upon evidence of "the details of each bargaining session" between Piedmont and ALPA, commencing with the first one in November 1967 and in each such session thereafter, including those conducted by the National Mediation Board and thereafter, whether ALPA had done what the Court should consider ALPA should have done to make "every reasonable effort" to resolve the dispute in accordance with Section 2, First of the Railway Labor Act. Thus, depending upon what the Court should find from the evidence, it would permit ALPA to strike or it would remand the parties to some point in the dispute, which apparently could be to a pre-mediation point (in the American Airlines case the Airline sought remand only to the date of the report of the Presidential Emergency Board) and to require the parties to re-negotiate, re-invoke the jurisdiction of the National Mediation Board and re-mediate (assuming the courts have the power to require re-mediation), and thereafter determine,

upon evidence of what the parties had done in renegotiation and re-mediation, whether ALPA had "made every reasonable effort" in accordance with Section 2, First to resolve the dispute so as to be entitled to strike, or should require the redoing of some requirement of the Railway Labor Act.

The Railway Labor Act contains no provision for the proceeding directed by the Court of Appeals for the Fourth Circuit in *Piedmont;* however, such a proceeding is contemplated by Sections 8 and 10 of the Labor Management Relations Act (29 U. S. C., §§ 158, 160; Br. App. A, pp. A-10-15; *See* discussion and cases cited, 22nd Annual Report, National Labor Relations Board, 1957, pp. 115-116; 31st Annual Report, National Labor Relations Board, 1966, pp. 151-153; 32nd Annual Report, National Labor Relations Board, 1967, pp. 175-180, 183-185; 33rd Annual Report, National Labor Relations Board, 1968, pp. 165-168), which expressly do not apply to parties subject to the Railway Labor Act, 29 U. S. C., §§ 152(2), 152(3) (Br. App. A, pp. 9-10). It is thus apparent that the Court of Appeals for the Fourth Circuit would incorporate into Section 2, First of the Railway Labor Act the provisions of Sections 8 and 10 of the Labor Management Relations Act. It is thus clear that in the *Piedmont* case, the Court of Appeals for the Fourth Circuit disregarded what this Court said, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30 at 31, fn. 2, that "[t]he relationship of labor and management in the railroad industry had developed on a pattern different from other industries" and that "[t]he fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis for the National Labor Relations Act. . . ", and also disregarded a similar admonition by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U. S. 369 at 383-4 (1969), ". . . that the National Labor Relations

Act cannot be imported wholesale into the railway labor arena" and that "[e]ven rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes."

In this case the CNW seeks the same result as was contemplated by the Court in *Piedmont*. It is best illustrated by Petitioner's claim that the union has not exhausted the requirements of the Railway Labor Act in compliance with Section 2, First because it refused to handle the crew consist dispute arising from the notices served in June and July 1965 by the union's several general chairmen upon the CNW and other railroads concurrently and in conjunction with the dispute arising from the notices served in December 1965 by the CNW and other railroads on the union's general chairmen through a single committee representing the union's general chairmen with the National Railway Labor Conference representing all the railroads on a national basis. This claim was asserted by Petitioner notwithstanding the decision in *Atlantic Coast Line v. Brotherhood of Railroad Trainmen*, 383 F. 2d 225 (D. C. Cir. 1967), *cert. denied*, 389 U. S. 1047 (1968), that the union had not breached any duty under the Railway Labor Act by refusing to agree to such national handling. The railroad's contention in this case, as explained by its Vice-President, is that the decision in the *Atlantic Coast Line* case was based upon evidence offered by the union that crew-consist disputes properly could not be resolved by a national agreement but only on the basis of local conditions, but that, in dealing with the railroads individually, the union had in fact negotiated individual agreements amounting to a national agreement which it was attempting to force on the CNW and thus had not made the "every reasonable effort" required by Section 2, First of the Railway Labor Act to make an agreement with the CNW on the basis of the position it took in the *Atlantic Coast Line* case (A. 68-78).

And the CNW further stated its position that the Court should hold all of the 100-120 crew-consist agreements made by individual railroads with the union's general chairmen to have been unlawfully made and to remand the railroads and the union to where they were with respect to the dispute at the expiration of the Award of Arbitration Board 282 in January 1966 for the dispute to be rehandled on a national basis through the procedures of the Railway Labor Act—negotiation and mediation (A. 102, 182-183).

Under *Piedmont* and the contention of the CNW, the District Court would be required to take evidence with respect to the conduct of the parties in *each* of the negotiation and mediation sessions in which the parties participated, as outlined in the statement in this Brief, in order to determine whether there had been compliance with Section 2, First and what further should be done by the parties—if anything.

The annual reports of the National Mediation Board for 1960 through 1969 disclose that the Board terminated its jurisdiction of 369 major disputes, 139 of those disputes during the fiscal year ending June 30, 1969 (Br. App. D, p. A-32). Thus, if the view of the Court of Appeals for the Fourth Circuit in *Piedmont* should be made applicable to the Railway Labor Act, it necessarily could result in the District Courts of the United States being required *ex post facto*, to participate in the negotiations and mediation of major disputes. This has not heretofore been considered by this Court to be the role of the judiciary and would require the Courts to do so, as was observed by Judge Friendly speaking for the Court of Appeals for the Second Circuit in *Chicago, R. I. & P. R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (1961) at 67, ". . . without the advance administrative screening provided under the National Labor Relations

Act . . .". This judicial inquiry would be outside the "detailed framework" of the Railway Labor Act for the settlement of major disputes stated by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal,* 394 U. S. 369 at 378-381:

> "Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' Florida E. C. R. Co. v. Brotherhood of Railroad Trainmen, 5 Cir., 336 F. 2d 172, 181 (1964). We have consistently so held in a long line of decisions.
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> "Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies, no such general provisions have ever been enacted. And for the settlement of major disputes,
>
> > " 'the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No

authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.' Elgin, J. & E. R. Co. v. Burley, *supra*, at 725, 65 S. Ct., at 1291.

"We have not previously had occasion to consider whether the Railway Labor Act circumscribes state power to regulate economic warfare between disputants subject to the Act.

* * * * * * * *

". . . We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were—as they frequently would be—subjected to various and divergent state laws. . . ."

Certainly the positions of parties to a major dispute in the course of negotiations and mediation, their willingness to submit to arbitration or abide by the recommendations of a Presidential Emergency Board and voluntarily to resolve the dispute would be seriously affected by the knowledge that if, after the procedures of the Railway Labor Act were exhausted, they would, nevertheless, be subject to a judicial proceeding with respect to whether, in the exhaustion of those procedures, they had made "every reasonable effort" to resolve the dispute as contemplated by Section 2, First of the Railway Labor Act and the attend-

ant delay and uncertainty with respect to the result of such judicial procedure and the right to the exercise of economic self-help.

Obviously the adoption of such a rule would be to increase the number of major disputes which, although having run the gamut of the Railway Labor Act procedures, would permit one of the parties to seek a judicial forum to prolong the dispute pending judicial determination whether there had been compliance with Section 2, First. Such a rule of law would tip the scales in favor of the railroad because of its economic interest in delaying the implementation of the union demands. It might be that in some small number of cases it would be in the interest of the union to delay self-help by the railroad; however, the union would find it difficult, if not impossible, to obtain a finding by a district court that the injury which would be suffered by it would be irreparable.

Moreover, in cases in which non-compliance with Section 2, First should be found, the district court then must, under *Piedmont*, as under Sections 8 and 10 of the Labor Management Relations Act, provide a means for determining compliance and for the dissolution of an anti-strike injunction upon a judicial determination that Section 2, First has been complied with. The district courts of the United States are peculiarly ill fitted for such continuing superintendence of labor disputes. This would be particularly true where proposals of the parties are for changes in a great number of complicated rules embodied in existing agreements or for the addition of many such complex rules with respect to which the district courts would be required to take evidence as to the bargaining conduct of the parties.[1] For example, the Presidential Railroad

[1] "In the railroad and airline industries, the importance of these conferences for full consideration of the proposals cannot be overemphasized. This is particularly true when the proposals involve

Commission required hearings occupying ninety-six days, resulting in a transcript of over 15,000 pages and exhibits of over 20,000 additional pages, and a period of approximately twenty months to complete its fact-finding function and a total of two years to complete its report as to the proposals of the parties in their 1959 and 1960 notices, of which this crew-consist dispute was only one. Presidential Railroad Commission Report of February 28, 1962, pp. 29-33. *See also International Association of Machinists, etc. v. National Mediation Board*, 425 F. 2d 527 at 530-531, 532 (D. C. Cir. 1970). Moreover, unlike the National Labor Relations Board, the decisions of the district courts necessarily would result in a non-uniform duty being applied.

Surely the Railway Labor Act does not contemplate such judicial proceedings and they should not be tacked onto the requirements of the Act by incorporating into Section 2, First of the Railway Labor Act the provisions of the Labor Management Relations Act for the determination and the prevention of "unfair labor practices".

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change of complex rules, or entire revision of agreement. In the latter case the employment contract may contain as many as 100 provisions or rules, dealing with rates of pay, hours of service, and the many and varied conditions affecting working assignments. A proposed change of a single rule often develops numerous issues between the parties. The necessity of exhaustive efforts by the parties themselves in direct negotiations to settle, if possible, all disputes or reduce to a minimum the differences or issues, is essential where the proposals involve contemplated changes in a great number of working rules, otherwise the succeeding procedural methods of mediation, arbitration or emergency board proceedings are handicapped by the necessity to consider voluminous and detailed testimony, exhibits and other evidence pro and con with relation to costs, administration problems, etc., involved in the proposals. The agreements and the individual rules are deeply rooted in tradition and meaning, having been developed over many years to their present-day form and status through the processes of collective bargaining, mediation proceedings, arbitration and adjustment board awards, and emergency board recommendations." *Administration of the Railway Labor Act by the National Mediation Board 1934-1970*, pp. 27-28.

In the other cases cited by petitioner in support of its argument that Section 2, First is justiciable, the statements in the opinions relied upon by petitioner were *dictum* or the Court took evidence of the conduct of the parties and determined the question upon the *assumption* that Section 2, First is justiciable, as appears from the analysis of most of these cases in Respondent's Brief in Opposition with which we shall not further burden this Brief; in the additional cases now cited by Petitioner, the question of justiciability of Section 2, First was neither raised nor decided.

III

The National Mediation Board, Not the Courts, Is the Agency Provided by the Railway Labor Act With "Jurisdiction" to Assure Compliance With Section 2, First and to Determine Whether and When Parties to a Major Dispute Have Exhausted the Procedures of the Railway Labor Act and May, Subject to Emergency Board Procedures, Exercise Economic Self-Help.

The exercise of economic self-help is the ultimate method authorized by the Railway Labor Act for the resolution of major disputes. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company*, 394 U. S. 369, 378-379 (1969). The same is true with respect to such disputes arising under the Labor Management Relations Act, 29 U. S. C. 163.

It is the purpose of both the Railway Labor Act and the Labor Management Relations Act to provide for the resolution of management-labor disputes by agreements reached through collective bargaining prior to the exercise of self-help, 45 U. S. C. 151 (a) and 29 U. S. C. 141, 151 (Br. App. A, pp. A-1-2, 6-9). The Labor Management Relations Act provides for the prevention of the exercise of self-help by a party to a labor dispute without such party having bargained with the other in good faith by empowering the National Labor Relations Board to ob-

tain injunctions against the exercise of self-help by a party which is alleged not to have bargained in good faith, 29 U. S. C. 159 (a) (5) and (b) (3); 160 (e), (j) and (k) (Br. App. A, pp. A-10-15); *See also American Airlines, Inc. v. Air Line Pilots Ass'n.*, 169 F. Supp. 777 at 793-796 and cases cited therein, which was misapplied to the Railway Labor Act as heretofore shown, and *National Labor Relations Board v. American International Insurance Company*, 343 U. S. 395 (1952).

But the Labor Management Relations Act provides only for the exercise of self-help to be denied the parties to a dispute subject to that Act only until after conferences, which are but the first step of the procedures of the Railway Labor Act. There is no provision in the Labor Management Relations Act for the exercise of self-help to be deferred subsequent to conferences, as there is in the Railway Labor Act for the denial of self-help during compulsory mediation and thereafter, in some cases, during and after an investigation and Report to the President by an Emergency Board.

In *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 392 U. S. 142, this Court stated the interrelationship of the status quo provisions of the Railway Labor Act and the provisions of Section 2, First of the Railway Labor Act imposing upon parties to such a dispute the duty "to make every reasonable effort" to settle the dispute. In that case this Court (396 U. S. at 148-152) reviewed the purpose of the Railway Labor Act and its provisions for the non-compulsory settlement of major disputes involving the formation and changing of collective agreements and said:

> ". . . It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. . . . *A final and crucial aspect of*

the Act was the power given to the parties and to representatives of the public [the National Mediation Board] *to make the exhaustion of the Act's remedies an almost interminable process.* As we noted in Brotherhood of Railway & Steamship Clerks, etc. v. Florida E. C. R. Co., 384 U. S. 238, 246 (1966), 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute'.

"The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

"There are three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures. . . . These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2 First, 'to make every reasonable effort' to settle disputes without interruption to interstate commerce.

"While the quoted language of [the status quo provision], §§ 5, 6 and 10 is not identical in each case,

> we believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period. . . ." (emphasis supplied).

Thus, under the Railway Labor Act the National Mediation Board has authority to do more than the National Labor Relations Board to accomplish compliance with Section 2, First of the Railroad Labor Act and for the resolution of disputes by agreement. Under the Railway Labor Act the National Mediation Board may prevent the exercise of self-help by requiring the status quo to be maintained for an "almost interminable" period of time, until the National Mediation Board is satisfied, based on its intimate relationship with the parties to the dispute, and until it determines, as it customarily does and as it did in this case, that:

> "It is the judgment of [the] Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement" (A. 199).

Petitioner's contention (Br. p. 71) that respondent is required to demonstrate that the National Mediation Board has an adjudicatory responsibility, such as that of a Court, to enforce Section 2, First of the Railway Labor Act, is without merit. As demonstrated in Point I of this Brief, Section 2, First is not justiciable and petitioner's contention assumes the question presented in this case; petitioner also simplistically conceives that every duty expressed in the Railway Labor Act must be considered as administratively or judicially enforceable, notwithstanding the contrary decisions of this Court heretofore discussed.

Petitioner asserts (Br. 44-47) that the "cooling off" or status quo periods, following the termination of mediation or a Report by a Presidential Emergency Board, are the

periods during which the necessity is most pressing for insuring compliance with Section 2, First through a judicial proceeding during which the exercise of self-help is postponed and made dependent upon the result of such judicial proceeding. This assertion presupposes that the provisions of the Act for mediation and for the marshaling of public opinion as a result of a Report by a Presidential Emergency Board are and will be totally ineffective; but, if that is so, then the remedy is for Congress, by amendment of the Railway Labor Act and not for the Courts, to tack such a judicial proceeding onto the existing procedures of the Act and to make the exercise of self-help dependent upon the result of such a judicial proceeding.

This Court has repeatedly held, as the Court of Appeals for the Fourth Circuit in the *Piedmont* case recognized, that the exercise of economic self-help is the ultimate means for resolving railway labor disputes, regardless of whether such self-help becomes available by the termination of the jurisdiction of the National Mediation Board of a dispute or after an investigation and report by a Presidential Emergency Board or as a result of a judicial determination that the provisions of the Act for resolving the dispute by agreement have been exhausted.

The Court below correctly treated the authority of the National Mediation Board to induce and assure compliance with Section 2, First as the method provided by the Railway Labor Act in preference to judicial intervention, as stated by Judge Kerner for the Court below (A. 225-226; 422 F. 2d 987):

> "Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a

reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination."

CONCLUSION

The decision of the court below is in accordance with decisions of this Court, is based on the accepted view of the scheme and procedures of the Railway Labor Act, and correctly rejected Petitioner's argument which is based upon a misconception of decisions of this Court and of statements in opinions of this Court and upon *obiter dictum* and mistaken assumptions by lower courts.

For the foregoing reasons, the decisions of the courts below dismissing the complaint should be affirmed.

Respectfully submitted

JOHN H. HALEY, JR.
605 First National Bank Building
East St. Louis, Illinois 62201

JOHN J. NAUGHTON
120 West Madison Street
Chicago, Illinois 60602

Attorneys for Respondent, United Transportation Union

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APPENDIX

APPENDIX A

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TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 456.

Section 301.

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577.

Section 1 (now 45 U. S. C. 151a).

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to

provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2, First (now 45 U. S. C. 152, First).

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second.

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

Section 2, Third.

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

Section 5.

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services, in any of the following cases:

(a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions; . . ."

RAILWAY LABOR ACT OF 1934, ch. 691, 48 Stat. 1185, 45 U. S. C. 152

Section 2, First (now 45 U. S. C. 152, First).

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second.

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Third.

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other

contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee

of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 5, First (now 45 U. S. C. 155, First).

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time. . . ."

NATIONAL LABOR RELATIONS ACT OF 1935, ch. 372, 49 Stat. 449.

Section 1 (now 29 U. S. C. 151).

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) im-

pairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect

of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, 61 Stat. 136, **amending** the Labor Management Relations Act of 1935, 49 Stat. 449, now 29 U. S. C.

Section 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 152(2).

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 152(3).

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not ob-

tained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 158(a)(5).

"It shall be an unfair labor practice for an employer— . . .

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 158(b)(3).

"It shall be an unfair labor practice for a labor organization or its agents— . . .

to refuse to bargain collectively with an employer provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 158(d).

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract in-

corporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Section 160 (b)

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such

charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

Section 160(e)

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to

be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is materal and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Section 160 (j)

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 160 (k)

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

APPENDIX B

Statements made by Donald Richberg in **Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce**, 69th Cong., 1st Sess. (1926).

Mr. Richberg's complete statements were as follows; the portion omitted by petitioner at pp. 36-37 of its brief appears in italics:

> Mr. Fredericks. Now does this law up to the time where the mediation board is provided for require the doing of anything which you could not do without it?
>
> Mr. Richberg. Require otherwise?
>
> Mr. Fredericks. Yes.
>
> Mr. Richberg. I think it does; in other words, it requires both parties to make every reasonable effort to make and maintain agreements. It makes that a legal duty upon them.
>
> Mr. Fredericks. How is that enforced?
>
> Mr. Richberg. Well, that is a different question.
>
> Mr. Fredericks. I know it is. I am asking you as a different question.
>
> Mr. Richberg. Well, when you say to require—I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the

courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

Now there are certain limitations upon what I have said, because how far the court, for example, can compel the parties to exert every reasonable effort, what that means, may be a question. But when the transportation act was under consideration by the Supreme Court the Supreme Court said that very clearly there was no purpose by Congress in passing that act to have the labor board's orders enforced by judicial order.

What we have sought here is not to enforce the orders of any Government tribunal, but to provide a basis upon which it may be possible to enforce legal obligations written by Congress. Now that would present a different question in a judicial proceeding. For example, it may well be that an effort on the part of any group of men or either party, representing either employer or employees, to set up barriers to the free operation of this law, would be in violation of the law, and it would be possible to obtain judicial power to enforce that.

Mr. Fredericks. How?

Mr. Richberg. It depends upon the particular manner in which the law might be violated.

Mr. Fredericks. Well, can you suggest a violation and a remedy?

Mr. Richberg. I can think, for example of this situation. Suppose under the third paragraph of section 2 which provides that representatives shall be designated by the parties in such manner as may be provided, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other, there

should be any effort to influence or control the selection of representatives. I think under those circumstances that any effort on the part of either the employer or the employee to control the operations of the organization of the other, to influence or control the selection of representatives, would amount to either an individual action or a combination of actions —I do not like the word "conspiracy," but let us say for a moment "conspiracy"—to violate this law, and the courts have found remedies for enjoining concerted action and even individual action to violate the law.

Mr. Fredericks. It is rather negative? All of that is negative, is it not?

Mr. Richberg. That is negative; yes. Of course, the theory all through this law has been that we were not seeking, as I said in the beginning, the force of government.

* * * * * * *

Mr. Fredericks. Now let me ask you a general question. In the matters of railroad labor disputes which have occurred in the past few decades there has arisen a volume of law and decision, some statutory and some decision. Now I am asking this as a very general question; you may not be able to answer it, and you may—does this bill set aside or nullify any of that structure of law?

Mr. Richberg. That is a broad question, but I say in all sincerity, to the best of my knowledge, and I have studied this very intensively, I do not believe that there is any provision of either statutory law or law written in the courts which this bill nullifies in any way. Now, I am quite sure that it does not in any way disturb the general law regarding industrial relations, let us say. I am sure that it has no effect upon what I referred to previously as the development of the law of conspiracy in the courts, with which I am not

wholly in sympathy, but I will say that I do not think that this bill affects it.

As to any law of Congress, as to any statute, any Federal statute, it repeals the Newlands Act and substitutes the same sort of mediation proceedings. So that it can not be said to really affect that law, except to strengthen and improve it.

It repeals, of course, Title III of the transportation act, but Title III of the transportation act has been, by the decisions of the courts, construed to amount to very little more than an expression of public opinion and an attempt to invoke public opinion. There is very little legal force in the transportation act. So you can not say that any substantive law, other than Title III of the transportation act, is written out of the law by the passage of this bill.

So that I believe I am quite safe in saying that it does not alter either the statute law or the law as written in the courts in any way that is not perfectly apparent upon the face of it as I have indicated. (House Hearings, pp. 40-42.)

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Mr. Mapes. Suppose that Congress should enact this bill into the law, and there should be no agreement entered into at all by the employees and the management, what parts of the law would be enforceable?

Mr. Richberg. In the first place, I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law. But outside of that, if the parties do not make an agreement, I think you

face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and, second, if that effort was unsuccessful, whether they could bring them to refer that dispute to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment.

I do not believe—I may be unduly optimistic, but I hardly believe that many railroads, if any, and I do not believe that any organizations at all, could probably resist the pressure provided in this law upon them to really exert every reasonable effort to make an agreement, and in view of the fact that this is not a new field it ought not to be very hard to write agreements. In other words, this is not as though we were opening up an entire new field in industry.

Agreements between railroads and their organizations have been in existence for long periods of time. The general terms of such agreements are all worked out. They exist to-day covering the great majority of the employees on the railroads. They exist on either all the railroads or on a great proportion of the railroads, so that it is not as though you were suggesting opening up an entire new field. It is not a very difficult situation to get down to what are any differences between parties as to the type of agreement which should be written. There are too many agreements now.

Mr. Mapes. That is my understanding, but I was rather anxious to have your statement of just what would be the effect if they did not agree. Without any agreement it seems to me, from reading the bill, the emergency board provisions would be in effect. Am I right in that?

Mr. Richberg. Yes; first, the board of mediation provisions, and then the emergency board in the last

analysis, if they attempted a test of economic strength, so called.

Mr. Mapes. There is no doubt in your mind but what those two provisions would be in operation regardless of whether the parties could agree or not?

Mr. Richberg. Quite regardless; yes; very clearly, because before the emergency board is the board of mediation in its jurisdiction. It is given jurisdiction not merely of a dispute over grievances, not merely of a dispute regarding changes in rates of pay or rules, but also of any other dispute which is not decided in conference, and it was the intention of all the parties to give complete jurisdiction over all disputes. Id. 66-67.

• • • • • • • •

Mr. Huddleston. Now, referring to section 2 on page 3, it shall be the duty of all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements," etc. Do you agree that that also is unenforceable by judicial proceeding?

Mr. Richberg. Not always. I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. I am sure it would work both ways.

Mr. Huddleston. "To exert every reasonable effort."

Mr. Richberg. In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier of its appropriate officers to refuse to even meet a committee that sought to make an agreement.

Mr. Huddleston. That is substantially the same provision as is carried by section 301 of the Esch-Cummins Act.

Mr. Richberg. I would like to question, whether that can be called substantially the same, Mr. Huddleston,

for this reason: The Esch-Cummins Act—that is, the transportation act—provides it shall be the duty of the carriers and employees to exert every reasonable effort to avoid any interruption to the operation of the carrier. Now, that is exactly what we have tried to change here. In other words, that means it is their duty to do anything that they think is wise to preserve the services from being interrupted.

Mr. Huddleston. Of course, that is broader than this language. I did not refer to that aspect of it, but merely to the "duty" aspect.

Mr. Richberg. Well, with reference to the duty aspect, it was my impression that if anything in this transportation act was enforceable, it might be that duty, but in the cases in which an effort was made to get a court, to get the judicial power behind the act, in which I participated more or less, it seemed that that question was always lost in the question that the court discussed and finally decided as to whether the orders of the labor board were enforceable, and I do not think we have gotten a clear-cut decision as to whether, for example, a combination of either carriers or employees to violate that duty was not a violation of law. I do not think we ever had that decision.

Mr. Huddleston. That is just the point I was coming to. I wanted to ask you what the courts have held with reference to that clause of the transportation act.

Mr. Richberg. I do not think it has ever been squarely met and answered, because I have participated in practically all the cases involved in this transportation act in one form or another, and in one case I, in fact, did not go through it to the final participation in the Supreme Court, just because of the fact that I did not believe we were going to get a decision that would give us light on that question. I

do not think the courts have held, even under the transportation act, that when Congress imposes the duty in the interests of the public that a party can go out and arbitrarily violate that duty just because Congress does not always fix a penalty of fine or imprisonment. I do not think that is the law.

Mr. Huddleston. I have held as to the Esch-Cummins Act the same opinion as you now express, but I was under the impression, not having kept up with the decisions, that the courts had held that section 301 could not be enforced by injunction or other court proceeding.

Mr. Richberg. I will give you an example, Mr. Huddleston, in the Pennsylvania clerks' and shopmen's cases, which went to the Supreme Court of the United States. Now there was very earnest effort made in behalf of those organizations in those cases to get the court to pass on the question as to whether a duty was not imposed on a common carrier under the law which it had to fulfill, but as a matter of fact the presentation from the standpoint of the carrier was to the effect that the Labor Board had issued an order which they had refused to comply with, and the decision of the court went off on the basis that any order of the Labor Board, whether interlocutory or final, was not compulsory, and, therefore, they would not enforce it, and I do not believe that the decision in that case or any other case has passed on the question that I think is presented by your statement, and I think is presented again in this law, as to whether, if Congress imposes the duty—and particularly, let me say, on a public service corporation—whether that duty can be deliberately and willfully violated without permitting a court to interfere and check such a violation of law.

Mr. Huddleston. You think, then, that this section is enforceable?

Mr. Richberg. I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power. Id. 84-85.

APPENDIX C

United States District Court
For the District of Columbia

Charles H. Ruby, as President of the Air Line Pilots Association, International and the Air Line Pilots Association, International, an Unincorporated Association, Plaintiffs, v. Piedmont Aviation, Inc., Defendant.	Civil Action. No. 1820-69.

Findings of Fact, Conclusions of Law and Order

(Filed August 1, 1969)

This cause came on to be heard upon plaintiff's motion for a preliminary injunction on July 16, 1969. The Court having considered the pleadings and all other documents filed herein, and having heard argument of counsel for both parties, makes the following

Findings of Fact

1. Plaintiff Air Line Pilots Association, International ("ALPA") is an unincorporated association organized for the purposes and objectives of a labor organization. ALPA is a "representative" as defined in Section 1, Sixth, of the Railway Labor Act (the "Act"), 45 U. S. C., § 151, Sixth, and is the duly recognized and authorized exclusive col-

lective bargaining agent for the air line pilots employed by defendant.

2. Defendant Piedmont Aviation, Inc. ("Piedmont" or "defendant"), is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Act, 45 U. S. C., § 181, and is subject to the provisions of the Act.

3. Collective bargaining between the Association and the defendant is subject to the requirements of the applicable provisions of the Railway Labor Act.

4. Prior to 1967, the defendant purchased twelve Boeing 737 twin turbojet aircraft which ultimately were scheduled to be placed in service by the defendant, beginning July 1, 1968.

5. Following oral discussion by the parties on August 28, 1967, the Association, on October 16, 1967, opened bargaining for a crew complement on the Boeing 737's by submitting to the defendant a proposal calling for a minimum crew of three, including a pilot, co-pilot and observer pilot. Thereafter, the defendant counterproposed a two-man crew complement for the Boeing 737's, consisting of a pilot and co-pilot.

6. During the months of November, December 1967 and January, February 1968, the parties met extensively in collective bargaining but without resolving the dispute over the crew complement for Boeing 737's. On March 1, 1968 the Association applied for intervention by the National Mediation Board. Thereafter the parties met in mediation under Section 5, First, of the Railway Labor Act, 45 U. S. C., § 195, on numerous occasions in the months of May, June and July 1968, but still without resolving the crew complement issue. On such matter, Piedmont pro-

posed a two pilot crew complement and ALPA proposed a three pilot crew complement.

7. On July 24, 1968 ALPA and Piedmont entered into a collective bargaining agreement and a letter of agreement governing operation by Piedmont's pilots of B-737 turbojet aircraft. Said letter of agreement provided:

"This Letter of Agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Piedmont Aviation, Inc. (hereinafter known as the 'Company') and the Air Line Pilots in the service of Piedmont Aviation, Inc., as represented by the Air Line Pilots Association, International (hereinafter known as the 'Association').

"*Witnesseth*:

"It is hereby agreed that the following rates of pay for operation of B-737 equipment will apply:

"Rates for 3-man operation effective 7/1/68 for 80 hours:

Captain	— $2463
Copilot	— 1600
Second Officer	— 500

"Computed as follows:

Hourly	— Day—11.87 Nite—14.37
Gross Weight	— 100,000 lbs.
Mileage	— 460 MPH

"Rates for 2-man operation (80 hours) effective 1/1/69 based on the assumption that United procedures or arbitration results in a decision for a 2-man operation:

Captain	— $2763
Copilot	— 1800

"All provisions of the Agreement effective July 1, 1968 not specifically changed or amended by this Letter of Agreement shall remain in full force and effect.

"This Letter of Agreement shall become effective July 1, 1968 and shall remain in full force and effect concurrently with the Pilot Employment Agreement effective July 1, 1968, except that:

"In the event the United arbitration or procedures result in a decision for a 3-man operation, the parties agree to reopen negotiation under the provisions of the Railway Labor Act for 3-man operations and rates of pay beginning January 1, 1969.

"In Witness Whereof the parties hereto have signed this Letter of Agreement, this 24th day of July, 1968."

8. The reference to "United arbitration or procedures" in the B-737 agreement was to evaluation and other proceedings being conducted pursuant to an agreement between ALPA and United Airlines Inc. on B-737 crew complement. Because of delay in final United-ALPA proceedings, Piedmont and ALPA, by letters dated December 20 and December 27, 1968, extended the January 1, 1969 date of their agreement to coincide with the date for implementation of the Special Review Board decision on United. This exchange of letters did not change the terms of the Piedmont-ALPA agreement dated July 24, 1968, except for the January 1, 1969 date.

9. On February 22, 1969, the United-ALPA Special Review Board issued its final report and recommendations. Said Special Review Board found that the Boeing 737 should be manned by a three pilot crew for the duration of the existing United-ALPA collective bargaining agreement, stating:

"The B-737 airplane in regular United Air Lines operations should be manned by a three-man crew for

the duration of the present basic agreement between the parties."

10. By letter dated February 27, 1969, ALPA advised Piedmont of its intention to reopen negotiations under the provisions of the Act and in accordance with the B-737 letter of agreement dated July 24, 1968. Negotiations were conducted on March 18, 1969, following which the dispute was docketed by the National Mediation Board under Section 5, First, of the Act as Case No. A-8572. Mediation was conducted in a session held May 5-8, 1969. The Boeing 737 crew complement issue has never been settled.

11. It is ALPA's position that the Piedmont-ALPA B-737 agreement of July 24, 1968 was intended to and required Piedmont to continue operation of B-737 aircraft with a three pilot crew in the event of a decision for a three pilot crew on United. ALPA further maintains that the issue of a two or three pilot crew complement has accordingly been resolved by the United-ALPA Special Review Board decision for a three pilot crew, and that the only issues properly open for negotiation and mediation between the parties in Case No. A-8572 were rates of pay and duties for three pilot crew operations. ALPA asserts that it maintained such position in negotiations and mediation in Case No. A-8572.

12. It is Piedmont's position that the July 24, 1968 B-737 agreement did not require Piedmont to continue with a three pilot crew in the event of such decision in United-ALPA proceedings, but required only that Piedmont and ALPA reopen negotiations on crew complement and rates of pay if the United-ALPA Special Review Board held for a three pilot crew. Piedmont asserts it maintained such position in negotiations and mediation in Case No. A-8572.

13. By letter dated June 6, 1969, the National Mediation Board advised the parties that its mediation efforts had

been unsuccessful in Case No. A-8572 and proffered arbitration in accordance with Section 5, First, of the Act. Piedmont, by letter of June 9, 1969, declined said request to submit the pending dispute to arbitration. By letter dated June 13, 1969, the National Mediation Board advised the parties that its services in Case No. A-8572 were terminated under Section 5, First, of the Act.

14. On June 9, 1969, ALPA applied to the National Mediation Board, pursuant to Section 5, Second, of the Act, for an interpretation of the July 24, 1968 agreement, reached in mediation under the provisions of the Act. Said application for an interpretation is presently before the Board for consideration.

15. On June 16, 1969, Piedmont notified ALPA of its intention to remove the second officer (third pilot) from Piedmont Boeing 737 aircraft effective July 16, 1969. This date was by stipulation of the parties herein changed to July 21, 1969. ALPA commenced the present action on June 30, 1969, seeking a preliminary injunction restraining Piedmont from removing the second officer from B-737 aircraft pending a final determination of this action.

Conclusions of Law

1. This action arises under the Railway Labor Act, as amended, 45 U. S. C., § 151 *et seq.* This Court has jurisdiction over this action, the parties and plaintiff's motion for a preliminary injunction.

2. The parties have, under the provisions of the Railway Labor Act, engaged in good faith negotiations and mediation in Case No. A-8572, without reaching an agreement, following which the National Mediation Board has terminated its services under Section 5, First, of the Act.

3. Under the provisions of the Railway Labor Act, the parties to a labor dispute are free, following expiration

of 30 days after termination of services under Section 5, First, by the National Mediation Board, to resort to self-help by economic action of either or both parties. *Bh'd of Railroad Trainmen* v. *Jacksonville Terminal Co.*, ... U. S. ..., 89 S. Ct. 1109 (1969).

4. The Court finds that plaintiff has not shown a reasonable probability of success upon final hearing of this action.

Wherefore, It Is Hereby Ordered that plaintiff's motion for a preliminary injunction be denied.

Dated: Aug. 1, 1969

/s/ H. F. Corcoran
Judge

Docketing and Disposition of Mediation Cases

APPENDIX D

A-32

YEAR(S)	MEDIATION CASES FORMALLY DOCKETED	MEDIATION CASES DISPOSED OF*	CASES PENDING AT END OF PERIOD	CASES DISMISSED (NMB JURISDICTION TERMINATED)	SOURCE (NMB, ANNUAL REPORTS FOR FISCAL YEAR ENDING JUNE 30 OF YEAR CITED)
1935-1960	6,277	6,135	-	-	26th AR, 1960, pp. 21,76,77
1960	309	292	233	17	26th AR, 1960, pp. 21,76,77
1961	236	229	221	20	27th AR, 1961, pp. 26,80,81
1962	218	205	234	17	28th AR, 1962, pp. 21,79,80
1963	236	199	271	10	29th AR, 1963, pp. 26,79,80
1964	246	252	265	28	30th AR, 1964, pp. 23,81,82
1965	261	236	290	28	31st AR, 1965, pp. 19,69,70
1966	672	236	526	41	32nd AR, 1966, pp. 23,77,78
1967	319	242	603	15	33rd AR, 1967, pp. 30,89,90
1968	245	284	550	54	34th AR, 1968, pp. 17,72,73
1969	251	343	458	139	35th AR, 1969, pp. 18, 76-77
1935-1969 +	8,761	8,375		-	35th AR, 1969, pp. 18,76,77
1960-1969	2,484	2,240		389	

* Includes Mediation Agreement, withdrawal before & after mediation, refusal to arbitrate by one or both parties and dismissal by the National Mediation Board.